No. 93-82

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
Petitioners,

v.

AVERELL SMITH, ARLO HALE SMITH, ADLAI SMITH, BRAD SPARKS, JIMMY HOM, EMILY TAYLOR, ALEXA SMITH, THOMAS KISTLER,
Respondents.

On Petition for Writ of Certiorari to the California Supreme Court

BRIEF OF *AMICUS CURIAE* OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF PETITIONERS

Of Counsel:

SHELDON E. STEINBACH
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle
Washington, D.C. 20036
(202) 939-9355

* Counsel of Record

STEPHEN S. DUNHAM *
KIMBERLY E. GHISELLI
MORRISON & FOERSTER
370 17th Street, #5200
Denver, Colorado 80202
(303) 592-1500

Counsel for Amicus Curiae American Council on Education

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BRIEF OF *AMICUS CURIAE* OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The American Council on Education ("ACE") is a non-profit national educational association founded in 1918 whose members include more than 1,700 public and private colleges, universities, and educational organizations throughout the United States. As a leading participant in higher education affairs, ACE's purpose is to promote the interests of all members of the academic community—students, faculty, administration and the in-

stitutions themselves. ACE participates as an *amicus curiae* only on rare occasions when a case, such as this one, presents issues of significant importance to higher education in the United States.

A university's ability to pursue effectively its educational mission is of vital concern to ACE. Universities provide the "marketplace of ideas" where exposure to diverse views and participation in robust debate shape our future. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). This marketplace extends beyond the confines of the classroom to include participation in student activity groups and student government. Funding of these groups through student fees creates an on-campus forum for the expression of multiple viewpoints on a variety of issues.

The California Supreme Court in *Smith v. Regents of the University of California*, 4 Cal. 4th 843, 844 P.2d 500, 16 Cal. Rptr. 2d 181 (1993), held that mandatory student fees used to fund student activity groups and student government violate dissenting students' First Amendment rights where a group's educational function is outweighed by its function of advancing a "political" or "ideological" goal. This ruling ignores the important interest universities have in creating an on-campus forum to foster student debate on a variety of issues, including issues labeled "political" or "ideological." Student activity groups and student government play a vital role in education. Moreover, the ruling below imposes on universities an unworkable burden to pick and choose which student groups are more educational and less ideological.

This Court should grant certiorari to settle an important issue of federal constitutional law—the extent to which the First Amendment imposes constraints on the use of mandatory student fees. This issue is of great concern to the many public universities that impose some type of mandatory student fee. ACE requests that this Court eventually reverse the decision below and hold that

content-neutral funding of student activity groups, including political and ideological groups, does not violate the First Amendment because student groups play a vital role in a university's educational mission.

ARGUMENT

I. BECAUSE THE PUBLIC FORUM PROVIDED BY STUDENT ACTIVITY GROUPS PLAYS A VITAL ROLE IN A UNIVERSITY'S EDUCATIONAL MISSION, FUNDING SUCH GROUPS DOES NOT VIOLATE THE FIRST AMENDMENT

A. The On-Campus Forum Provided by Student Groups Satisfies Important University Interests

Education is not limited to the classroom. The university atmosphere—conferences, debates, student government, lectures, and classes—all contribute to the university's educational mission to train our future citizens and leaders by providing "wide exposure to that robust exchange of ideas which discover the truth 'out of a multitude of tongues.'" *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)). Such exposure encourages the experimentation and creative ideas that are the hallmark of our system of higher education.

Applying a strict scrutiny test, the California Supreme Court required that the University establish a compelling interest in the mandatory funding scheme that could not be satisfied by less restrictive means.[1] *Smith*, 844 P.2d

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[1] As the *Smith* dissent notes, "[n]either *Abood* nor *Keller* addressed directly the constitutional standard to be applied in balancing the state's interest in the collection and use of a mandatory fee against the infringement of associational rights occasioned thereby." *Smith*, 344 P.2d at 523 (Arabian, J., dissenting). Where funding is content-neutral and has only a minimal effect on associational rights, mid-level scrutiny requiring substantial or important interests may be appropriate. The "[g]overnment may abridge incidentally individual rights of free speech and association when

at 507. University funding of student activity groups does not violate the First Amendment prohibition against compelled association because the groups are vital to the University's educational mission.[2] In addition, providing a public forum through a content-neutral funding scheme has, at most, only a minimal impact on dissenting students' associational rights and is the least restrictive means of effectively promoting student speech.

Mandatory student fees provide a forum through student activity groups for the exercise of student speech. Like the University of California, many colleges and universities choose to fund student activities, including political and ideological activities, through the imposition of mandatory student fees. *See* D. Meabon, R. Alexander & K. Hunter, *Student Activity Fees—A Legal and National Perspective* 23-29 (National Entertainment and Campus Activities Association 1979). ACE's member colleges and universities believe that funding student activity groups enhances and serves their educational mission. Student activity groups are traditionally funded in a content-neutral manner, allowing even unpopular groups an opportunity to speak in the campus forum. For example, the University of California uses student fees to fund both Berkeley Right to Life, an anti-abortion group, and the Campus Abortion Rights Action League, a pro-choice or-

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engaged in furthering the constitutional goal of 'uninhibited, robust and wide-open expression.'" *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

[2] The *Smith* majority holds that the University must satisfy strict scrutiny to justify mandatory fees to fund student government as well as student activity groups. *Smith*, 844 P.2d at 516-17. Student government is an inherent part of a university, and university funding of student government satisfies the same important interests as university funding of student activity groups. The analysis of the constitutional limitations on funding of student government is the same as the analysis applicable to student groups.

ganization. Activity groups encourage student involvement and result in participatory education.

The university atmosphere inherently includes "such a critical aspect of campus life" as extracurricular activities. *Widmar v. Vincent*, 454 U.S. 263, 278 n.2 (1981) (Stevens, J., concurring). Numerous lower courts recognize that education extends beyond the classroom and includes the funding of campus activities, such as student groups and student newspapers. *See, e.g., Carroll v. Blinken*, 957 F.2d 991 (2d Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 300 (1992); *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983) (upheld student funding of university newspaper); *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb.), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974) (use of mandatory student fees to subsidize school newspaper held constitutional). The important university interests met by student groups include "the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate." *Carroll*, 957 F.2d at 1001. Lack of funds significantly impairs the ability of student groups to participate in the forum. *Id.* These interests are sufficient to justify compelling students to fund a campus forum. *Id.*

In holding that the University could not fund political or ideological groups, the California Supreme Court found that at some point educational benefits become merely incidental to the group's goal of advancing political and ideological interests. *Smith*, 844 P.2d at 511. The court applied the standard established in the union shop and integrated bar cases, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), that the activity funded by the compelled fee must be "germane" to the organization's mission to overcome the infringement on First Amendment rights. *Smith*, 844 P.2d at 507.

Although *Keller* and *Abood* provide the general standard for analyzing whether compelled fees improperly infringe on First Amendment freedom of association, that standard should be applied in this instance within the context of higher education. *Keller* found that the use of compulsory state bar dues could not be used to finance ideological activities not necessarily related to the purpose of the compelled association—regulating the legal profession and improving legal services. Similarly, *Abood* held that a union could not use a dissenting individual's dues to fund ideological activities not germane to collective bargaining. The purposes of the state bar in *Keller*, to supervise attorney conduct, and the union shop in *Abood*, to negotiate contracts, are relatively narrow and definable.

The University's educational mission should not be construed so narrowly. Unlike the narrow focus of a state bar or labor union, education necessarily includes a broad range of political and ideological viewpoints. The court below even admits that "some student political activity is germane to the University's educational mission." *Smith*, 844 P.2d at 513. Moreover, colleges and universities across the country have numerous courses specifically aimed at presenting political and ideological ideas. Courses in history, literature, political science, and minority and women's studies necessarily require examination of various ideologies.

In addition to courses and student groups, campus speakers also expose students to various ideologies. In *Turner v. Sayers*, 575 So. 2d 1135 (Ala. Civ. App. 1991), student fees were used to fund a campus lecture series that included a speech relating to *Roe v. Wade* by one of the attorneys for the plaintiff in the case. The court upheld funding of the speech because it did not result in compelled association and "it is incumbent on a state university to promote the dissemination of ideas to its students. . . ." *Id.* at 1137.

Providing a university forum for learning and the exchange of diverse ideas can be met through various methods. Lectures in a classroom are one important method, but without the opportunity for students actively to express their own viewpoints, the learning process is incomplete. ACE believes that the California Supreme Court failed to recognize the uniqueness of the university's educational mission which, in the judgment of many higher education institutions, includes providing an on-campus forum for student speech.

The court below also failed to recognize that the University's use of student fees to fund a campus forum on a content-neutral basis does not force students to associate with a single position and, therefore, has little or no effect on First Amendment rights of association. *See Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1067 (1993) ("Creating a forum for student expression is a minimally restrictive means of advancing an educational interest."); *Kania*, 702 F.2d at 480 (same). Rather, the *Smith* majority relied significantly on both *Abood* and *Keller*, where mandatory dues were used to fund expression of a specific political or ideological viewpoint. In contrast, funding student activity groups on a content-neutral basis is a minimally restrictive means of providing a forum for student speech.

Public university funding of student groups, as well as student government, is constitutional because it satisfies an important and even compelling university interest and is the least restrictive means of satisfying this interest.

B. The California Supreme Court Failed to Give Appropriate Judicial Deference to the University's Decision to Provide a Student Forum

Universities have the expertise to decide how best to meet their educational mission. This Court has recog-

nized that governmental intervention in the intellectual life of a university should be avoided. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring). Universities are "characterized by the spirit of free inquiry," and academic freedom gives the university the ability "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study." *Sweezy*, 354 U.S. at 262-63 (Frankfurter, J., concurring).

The University of California made a judgment that the forum provided by funding student activity groups, including those engaged in political or ideological expression, plays a critical role in the University's educational mission. This decision should not be lightly ignored. As stated in *Veed v. Schwartzkopf*, "[w]ithin wide limitations, a state is free to adopt [its] educational policy," including the philosophy that the education of students extends beyond the classroom to publication of a school newspaper. *Veed*, 353 F. Supp. at 152. In fact, the court below recognized that "the Regents, to be effective, must have considerable discretion to determine how best to carry out the University's educational mission." *Smith*, 844 P.2d at 506. Despite recognizing the need for deference, the *Smith* majority failed to find that ideological and political student groups contribute to this mission. The court below improperly limited the University's academic freedom to decide how its students "shall be taught." *Sweezy*, 354 U.S. at 263.

II. FORCING THE UNIVERSITY TO DISTINGUISH BETWEEN "POLITICAL" AND "EDUCATIONAL" STUDENT GROUPS RISKS VIOLATING STUDENTS' FIRST AMENDMENT RIGHTS

When distributing funds to student organizations, the University must ensure that it does not violate the constitutional rights of students who wish to form campus organizations. Both the First Amendment public forum

doctrine and the subsidy doctrine significantly limit the type of distinction the University is permitted to make between organizations on the basis of their speech.

Since the campus of a public university possesses many of the characteristics of a public forum, the public forum doctrine is traditionally used to analyze university regulation of student speech. *Widmar*, 454 U.S. at 267 n.5 (rejecting attempt by university to exclude student religious organization from school facilities available to registered student groups). In the public forum context, exclusions from the forum based on the content of speech are allowed only to serve a compelling interest. *Id.* at 270. Once a university makes its facilities generally available to student groups, access to facilities cannot be denied based on the content of the group's speech without a compelling reason. *Id.* at 277. Under this same principle, universities are not permitted to discriminate among student groups based on the content or viewpoint of their speech where the administration of student activity fees supports a public forum.

The University of California currently uses the mandatory activity fee to create a public forum for students by distributing fees on a content-neutral basis. By funding groups without regard to the content or viewpoint of their speech, the University's policy detaches funding decisions from support or condemnation of different organizations' ideological positions. In contrast, the *Smith* majority's proposal that the University refuse funding for groups that are too "ideological" or "political" violates the rule against content and viewpoint discrimination in a public forum.

Further, as the *Smith* dissent points out, the distinction between educational and ideological or political speech is virtually impossible to make in many instances. Often, campus literature and presentations sponsored by "political" groups are educational. *Smith*, 844 P.2d at 525 (Arabian, J., dissenting). A university risks violating the

First Amendment if it categorizes a group such as the Sierra Club as political, while categorizing a campus group that organizes recycling as non-political, despite the fact that both groups gather information about the environment and advocate certain policies and strategies to preserve the environment.

In addition to restrictions placed on the University by the public forum doctrine, the First Amendment prohibits viewpoint discrimination where a speech subsidy is provided. A state university may provide a "forum for the expression of political and personal opinions with financial support of mandatorily assessed student fees . . . ." *Veed*, 353 F. Supp. at 152. Under subsidy analysis, if a public body chooses to fund speech it "must do so even-handedly, without discrimination among recipients on the basis of their ideology." *Gay & Lesbian Student Ass'n v. Gohn*, 850 F.2d 361, 362 (8th Cir. 1988) (holding that the First Amendment is violated where university denied funding for an association based on the content of the group's expression and no compelling support existed for this denial); *see also Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (holding that the state may not refuse to subsidize free speech on the basis of viewpoint). Applying this general rule in the context of student activity groups, a university, once it commits to funding student groups, cannot deny funding on the basis of the group's viewpoint on a particular issue.

Further, in light of this Court's recent holding in *Lamb's Chapel v. Center Moriches Union Free School District*, 61 U.S.L.W. 4549 (U.S. June 7, 1993), discrimination against the category of speech labeled "political" by the court below may amount to impermissible viewpoint discrimination. *Lamb's Chapel* held that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.*

at 4552. A speaker may not be denied access to a forum "to suppress the point of view he espouses on an otherwise includible subject." *Id.* at 4550. Under this framework, a university cannot favor those student groups that have a less "political" viewpoint on a particular subject. If two groups that address women's issues exist, a campus Women's Studies Club and campus National Organization for Women ("N.O.W."), funding the former but not the latter may impermissibly discriminate against N.O.W. on the basis of its political viewpoint.

Whether administration of student organizations is looked at through the lens of forum analysis, subsidy analysis, or some combination of both, the content-neutral guidelines the University has in place ensure that neither content nor viewpoint discrimination against speech occurs. The court below would have the University disregard content-neutral funding in favor of a funding scheme that excludes certain student groups on the basis of their message. This rule invites and may require the University to violate First Amendment rights of students who belong to groups that are judged too "political" or "ideological."

CONCLUSION

For all of the above reasons, the American Council on Education respectfully urges that this Court grant the Petition for Certiorari.

Respectfully submitted,

Of Counsel:

SHELDON E. STEINBACH
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle
Washington, D.C. 20036
(202) 939-9355

STEPHEN S. DUNHAM *
KIMBERLY E. GHISELLI
MORRISON & FOERSTER
370 17th Street, #5200
Denver, Colorado 80202
(303) 592-1500
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* Counsel of Record